IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

CIVIL APPLICATION NO.1190 OF 2005

IN

FIRST APPEAL NO.872 OF 2003 .

Smt.Chitra Nebhan Jethani : Petitioner.

versus

Mrs.Deepa Mangaram Jethani

and anr. : Respondents.

Mr.A.M.Joshi for the petitioner.

Mr.V.S.Gokhale for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 4th April 2005.

ORAL ORDER

1. This matter is heard by me on many occasions at the instance of the petitioner/appellant. This appeal was filed challenging the order of possession . Initially a condition was imposed upon the appellant to pay Rs.3,500/- per month for her occupation, pending appeal. Then subsequently on humanitarian ground this amount was reduced to Rs.2000/- per month.

Not a single farthing, excluding Rs.8000/-, in pursuance of both the orders, was paid or deposited by the appellant. Obviously there is no compliance to the directions given by the Court. The appeal is, any way, bound to be dismissed for non-compliance. In that background of the matter now the appellant prays that she may be permitted to withdraw the appeal. She is not doing any charity to other side withdrawing the appeal. She is, however, still contending that the order of payment passed earlier and her liability to pay the amount as per that order should not be there and that much concession should be given to her. The prayer is strongly opposed by the respondents and, rightly opposed by the respondents. The counsel for the appellant has relied upon the judgment of the Supreme Court reported in **(2004) SCC 304 [Union of India v. Banwar Lal & sons (P) Ltd.]** and, he contended that for the mesne profit, standard rent should be the basis. I do not find any substance in this submission. Even the judgment does not apply to the present case. The Issue before the Supreme Court in that case was, (a) whether the use and occupation of the property by the appellant after 10/3/1984 was wrongful and

illegal and in the nature of trespass ; and (b) whether the arbitrator had failed to take into account relevant factors in assessing damages awarded in favour of the respondent. That case of the Supreme Court is totally on different footing. Here in the instant case, there is a specific order against the appellant for depositing and paying the compensation. It was a condition imposed upon her at the time of considering her prayer for stay in the appeal. Then subsequently that amount was reduced by me on humanitarian ground and now the appellant wants to withdraw the appeal, but still she does not want to pay single farthing in respect of arrears that mounted and she cannot be simply permitted because the respondents are not ready and willing to this suggestion. This can only be done if the respondents agree and I cannot go beyond my order in the peculiar facts of the case. Therefore, this application is dismissed. The appeal is allowed to be withdrawn and disposed of with costs to the respondents through out. The appellant has agreed to hand over the possession of the suit property within one week from today. The statement of the advocate for the appellant is accepted in this regard.

[D.G.DESHPANDE]

04/04/2005 JUDGE.